FILE COPY.

Office Supreme Court, U.
FILED.
FEB 19 1907
JAMES H. McKENNE
CLE

No. 435. OCTOBER TERM, 1906.

Supreme Court of the United States

ROBERT M. GREEN, PLAINTIFF IN ERROR,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

INDEX.

	Page.
Statement of the Case	1
Specifications of Error	5
Argument	6

FRANK P. PRICHARD,
JOHN G. JOHNSON,
For Plaintiff in Error.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906. No. 435.

Robert M. Green, Plaintiff in Error,

vs.

Chicago, Burlington and Quincy Railway Co., Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The action in the court below was brought by the plaintiff, Robert M. Green, to recover from the defendant, the Chicago, Burlington and Quincy Railway Company, damages for an injury to the plaintiff while a passenger on the defendant's train, at a point in the State of Colorado. (Record, page 5.)

The plaintiff is a citizen of Pennsylvania; the defendant is a citizen of Iowa. The suit was brought in the Circuit

Court of the United States for the Eastern District of Pennsylvania, and the marshal made the following return (Record, page 4):—

"FEBRUARY 28, 1906.

"At Philadelphia, in my District, served the within "writ on the Chicago, Burlington and Quincy Rail-"way Company, a corporation which is doing busi-"ness in the Eastern District of Pennsylvania and has "an office for the transaction of said business at 836 "Chestnut Street, Philadelphia, in said district by giv-"ing a true and attested copy thereof to Harry E. "Heller, agent of said corporation, at said office, on "February 28th, A. D. 1906, at 4.20 o'clock, P. M. "So answers John B. Robinson United States Mar-"shal, per Abram B. Myers, Deputy."

A similar return was made as to service of the statement of plaintiff's demand.

The defendant, upon affidavit, obtained a rule to show cause why the service of the writ and statement should not be vacated, and the rule was subsequently heard upon the affidavit (Record, page 14), the cross examination of the person who made it (Record, page 7), and the documentary evidence produced on such cross examination (Record, pages 24 to 29, inclusive).

The court below made absolute the rule to vacate the service of the writ and statement (Record, page 18), on the ground that the evidence showed that the defendant was not doing business within the State of Pennsylvania. From the judgment of the court, the present writ of error was taken directly to this court. The question raised is one wholly of jurisdiction, and the case is submitted upon the printed briefs under the rules.

There is apparently some inconsistency in the dates and terms and numbers of the affidavit and deposition, owing to the fact that they were originally filed in a suit between the same parties, on the same subject mat-

ter, which was subsequently discontinued, on the ground of a defective return of the marshal, and a stipulation was made in the present case that the same testimony should be used as if taken herein (Record, page 6).

There was no conflict of evidence, and the facts shown to the court by the evidence already referred to were as follows (affidavits, Record, pages 14-17; depositions, Record, pages 7-13; documents, Record, pages 24-29):—

The Chicago, Burlington and Quincy Railway Company, the defendant in the case, is an Iowa corporation, operating a line of railroad from Chicago, Illinois, and St. Louis, Missouri, to Denver, Colorado, with various branches. It does not operate any railroad in the State of Pennsylvania. In order to secure business in competition with other lines the company maintains, in the city of Philadelphia, an office at No. 836 Chestnut Street (Record, page 8). It pays the rent of this office (Record, page 9), and prominently displays its name upon it (Record, page 8), and with its knowledge, its name, with its location at this office is inserted in the city directory and the telephone directory (Record, page 8). At this office, it has a general freight and passenger agent, who has charge of a district comprising portions of the States of Pennsylvania, Maryland, West Virginia and Virginia, and under him are various traveling freight and passenger agents, who report to him (Record, page 9). A staff of employees, consisting of two clerks and two stenographers, are also maintained at this office, who are in the employ of and paid by the company by payroll from Chicago (Record, page 11). The company advertises the names and locations of its "general agents," among which it gives "Philadelphia, Pennsylvania, 836 Chestnut Street, Harry E. Heller, District Freight and Passenger Agent" (Record, page 9). The correspondence from the office at Philadelphia is carried on on letter paper bearing the following printed heading (Record, page 24):—

"Chicago, Burlington and Quincy Railway Com-
"pany, Office of District Freight and Passenger
"Agent, 836 Chestnut Street, Philadelphia."

The character of the business carried on at the office is the securing of business over the railway lines, none of which are situated in Pennsylvania. In order to do this, the railway, through its agency at Philadelphia, advertises in the territory which is in the charge of the agent, answers inquiries as to rates of passenger and freight transportation, endeavors by correspondence and personal calls to secure a share of the business and enters into arrangements with prospective passengers and shippers for transportation as hereinafter stated (Record, page 10).

No tickets to ordinary passengers are kept on hand at the office of the company in Philadelphia, but when a prospective passenger desires a ticket and applies at the office of the company in Philadelphia, the agent there will take the applicant's money, go to one of the railroad companies running out of Philadelphia, and get from that company a prepaid order, which it gives to the applicant, who can then, on his arrival at Chicago, present the order at the Chicago, Burlington and Quincy Railway office there and receive his ticket (Record, page 10). The Chicago, Burlington and Quincy Railway also issues from its office, at Philadelphia, orders to railroad employees at reduced rates for transportation over the line of the Chicago, Burlington and Quincy Railway Company in connection with transportation over other lines. In a few cases the money is received from such employees at the Philadelphia office, and orders for tickets issued to them. In more of the cases, no money is received, but an order is issued at the Philadelphia office which the railroad employee can present at the Western office and there receive and pay for his ticket (Record, page 14). For the convenience of shippers also, the Chicago, Burlington and Quincy Railway, at its office at Philadelphia, receives from freight shippers who have shipped

goods over lines running out from Philadelphia to points reached by the Chicago, Burlington and Quincy Railway Company a surrender of their bills of lading over the initial line, and in return issues a receipt therefor (Record, page 27) entitled a "bill of lading," and which provides that if the goods are duly delivered to the Chicago, Burlington and Quincy Railway Company, they shall be transported over the line of such company at a certain rate of freight, subject to the conditions and regulations of the published tariff and rules, &c., and which further provides as follows:—

> "It is expressly understood and agreed that this "bill of lading is issued at the request of and for the "convenience of the shipper, and that said freight has "not yet been received by the Railway Company, and "that no obligation in respect to said freight is as- "sumed by this Railway Company, nor will this bill "of lading be in force until said freight is received by "this Railway Company.
>
> "Freight Agent."

In addition to these facts it further appeared that on or about October 1st, 1901, the Chicago, Burlington and Quincy Railway Company had leased the lines which it now operates from an Illinois corporation, known as the Chicago, Burlington and Quincy Railroad Company, and that this former corporation had occupied the same office, with the same agent performing the same duties at Philadelphia, and that said former corporation had duly registered with the Secretary of the Commonwealth of Pennsylvania, as a foreign corporation doing business in the State (Record, page 13).

SPECIFICATION OF ERROR RELIED UPON.

The learned Circuit Court erred in making absolute the rule to show cause why the service of summons should not be vacated.

ARGUMENT.

The sole objection to the jurisdiction made by defendant in the court below, and the sole ground on which its objection was sustained, was that the defendant, The Chicago, Burlington and Quincy Railway Company, was not doing business in the State of Pennsylvania at the time of the service of the writ. No objection was made to the method of service or that the agent served was not a representative agent to receive service, if the corporation was doing business in the State. The objection was that the corporation was not engaged in business in the State.

That the railway corporation was doing something in the State of Pennsylvania was not and could not be the subject of dispute. Whether that something amounted to a doing of business which made the corporation liable to suit in the State is the sole question involved.

To a large extent this is a question of fact depending on the evidence printed in the record. Before discussing this evidence, however, it may be well to briefly call attention to the principles of law which determine what state of facts must be established to make a corporation amenable to service of writs.

It was once thought that a corporation could not be sued except in the State under whose laws it was incorporated, and many of the early authorities go to this extent. The injustice of this doctrine and the results which flowed from it, led to the gradual adoption of a doctrine that a suit against a foreign corporation was maintainable on the doctrine of implied consent. This rested on the theory that, as the State could wholly exclude the foreign corporation, it could also impose terms of admission, and that if it specifically provided for suits against a foreign corporation, and the latter then did business within its borders, there was an implied contract that the corporation consented to be sued. The disadvantage of this doctrine was that it would not fit all cases. A State might not specifically provide for suits against foreign corporations, and yet might have gen-

eral laws relating to service generally, or the foreign corporation might be engaged in interstate commerce, and hence not need the consent of the State to come within the latter's borders.

The best considered decisions have now adopted the broad doctrine, that when a corporation, through its properly constituted agents, engages in business in a foreign jurisdiction, it may, irrespective of any consent, be found there for purposes of suit, and service upon its agents is service upon it, provided always that the agent is of such a representative character that service upon him may properly be considered service upon the corporation.

The development of the law on this subject can be readily traced in the opinions and cases cited in

Lafayette Ins. Co. *vs.* French, 18 How., 404;
Ex parte Schollenberger, 96 U. S., 369;
St. Clair *vs.* Cox, 106 U. S., 350;
Barrow Steamship Co. *vs.* Kane, 170 U. S., 100.

The last of these cases settled the question whether the broad rule above stated should be adopted.

In that case the suit was in the Circuit Court of the United States for the Southern District of New York, by a citizen of New York against a British corporation. It was for a tort committed in Londonderry Harbor, and there were no statutes of New York authorizing service on a foreign corporation under such circumstances. It was therefore a case in which there could be no implied contract or consent on the part of the foreign corporation. This court sustained the jurisdiction. The Courts of England have reached the same conclusion and the doctrine thus established will probably be ultimately recognized as the true doctrine in all the courts, State as well as Federal.

As to what constitutes the doing of business by a foreign corporation, it is manifestly impossible for the courts to lay

down any hard and fast rule. A single isolated transaction would not usually be sufficient, although the transaction might be of such magnitude, and involve so many acts as to be an exception to such a rule. A series of transactions in the State long continued usually amounts to the carrying on of business, but here again the acts might be of such a character, as, for example, the mere solicitation by traveling salesmen as not to come within the rule. Each case must be judged by its own circumstances. There are, however, certain elements which, if one or more of them exist, are usually considered to indicate the carrying on of a business, as *e. g.*:—

1. The establishment of a permanent office to which all persons having business with the corporation may come.
2. The employment of an agent located within the State who is advertised as a general agent of the corporation for such business as it transacts in the State.
3. The continuous making within the State of contracts binding on the corporation.

Examining the facts of the present case as disclosed by the evidence and in the light of the principles above referred to, it is submitted that the Chicago, Burlington and Quincy Railway Company was subject to the jurisdiction of the United States Circuit Court in which it was sued.

It was a railroad corporation of the State of Iowa, and operated certain lines of railroad west from Chicago. In order to meet the competition of other roads, it came into the State of Pennsylvania and there rented an office, on a prominent street in the city of Philadelphia, on which it prominently displayed its name, and at which, in addition to the agent in charge, it maintained an office force of two clerks and two stenographers. With its knowledge and consent, its name was inserted in the city and telephone directories, with its location at this office. It would be difficult to imagine an act more conclusive of its intention to locate in the State of Pennsylvania for the purpose of doing business therein. Had an individual rented a store

or an office in a similar manner, displayed his name on the outside and put a corps of his employees within, no one would have contended that he was not doing business there. If the corporation was not doing business at that place, whose was the business that was carried on? Something was being done by the agent in charge and the four employees. There must have been some object in renting the office, displaying the sign and keeping the four employees busy, and there is no other reasonable explanation, except that it was business of the corporation carried on for the corporation at the corporation office.

There have been cases in which it was the subject of dispute whether the office was really the office of the corporation or the personal office of the agent but in this case it is admitted that the corporation rented the office, displayed its name on it and kept its own employees at work within it.

On this ground alone it is submitted the court below should have held that the corporation was doing business in Pennsylvania.

Equally strong was the evidence as to the designation by the corporation of a general agent located within the State.

On page 25 of the Record will be found a sample of the defendant's advertisements. It contains a list of its "General Agents" and its "Traveling Passenger and "Freight Agents." In this list under the head of "Phila-"delphia, Pa., 836 Chestnut Street," is put "Harry E. "Heller, Dist. Fht. and Pas. Agt.—R. E. Wheeler Travel-"ing Passenger Agent, B. C. Cloud, Traveling Freight "Agent."

Harry E. Heller testified (Record page 9):—

> "15 × Q. Referring now to the advertisement in "the official guide and to the list headed 'General "'Agents and Traveling Passenger Agents,' will you "please explain what is the difference between a Gen-"eral Agent, a Traveling Passenger Agent and a

"Traveling Freight Agent? A. The General Agent "has charge of a district and is assisted by a Travel- "ing Freight and a Traveling Passenger Agent, re- "porting to the General Agent. 16 × Q. You would "therefore be the General Agent? A. Yes, sir. 17 "× Q. And what would be your district? A. My dis- "trict comprises the State of Pennsylvania as far West "as Altoona, that is in the middle, Cumberland, Md., "Charleston, W. Va., then directly South to the "North Carolina line in Virginia."

Here then was the employment of a general agent located in the State of Pennsylvania and having charge of a large district within which were employed traveling agents, who reported not to any office of the corporation in Iowa, but to the general agent at the office of the corporation in Philadelphia. There was, therefore, in the State of Pennsylvania, an agent who was in general charge of a branch of the company's business within a large district and the employees within that district reported to him as the representative of the company.

If within that district any one wished to correspond with the corporation on freight or passenger business, they were informed by the advertisement that Mr. Heller was the general agent of the company, and that he was the proper person and the office of the company at Philadelphia the proper place to receive communications.

Short of locating its principal office at Philadelphia, and putting its president in charge, it is difficult to see how the corporation could have more clearly indicated than it did that it was doing business in Philadelphia through a general agent located there for that purpose.

Equally strong is the inference to be drawn from the making of contracts in the State of Pennsylvania.

The evidence shows that in addition to the advertisement and the personal solicitation of business three different kinds of contract were habitually made at the office in the city of Philadelphia, viz.:—

First.—Contracts for transportation of ordinary passengers.

Second.—Contracts for transportation of railroad employees at reduced rates.

Third.—Contracts for the transportation of freight.

The character of the contracts for the transporation of passengers is illustrated by the case of R. L. Gardiner. In answer to an inquiry by postal a letter (Record page 24) was sent to him by the general agent upon a letterhead bearing the name of the corporation and its office at Philadelphia. In that letter it was said:—

> "We can furnish you with ticket or an order for "ticket at this office reading from Chicago to Den- "ver."

The agent testified (Record page 10):—

> "If Mr. Gardiner had called at our office for a ticket "from Chicago to Denver, we would have gone to the "Pennsylvania Railroad Company or the Philadelphia "and Reading and gotten what we call a prepaid or- "der issued by that line, pay them the money for it "and hand it to the passenger. He would have pre- "sented that order on arrival at Chicago and gotten a "ticket from Chicago to Denver and return or one "way as the case might be."

It is manifest that the contract with the passenger was complete the minute the agent at the Philadelphia office of the Chicago, Burlington and Quincy Railway Company handed the prepaid order to the passenger at that office. If when the passenger arrived at Chicago, the railroad had refused to honor the order the passenger would have had a right of action, and this not against the Pennsylvania Railroad Company or the Philadelphia and Reading Railroad Company, but against the Chicago, Burlington and Quincy Railway Company, whose agent had sold him the order at the company's office in Philadelphia.

The contracts for the transportation of railroad employees were similar in character, except that railroad employees are entitled to transportation at reduced rates, and also except that in the case of their transportation, the agent at the Philadelphia office usually gave them an order entitling them to a ticket at the point of junction of the initial carrier with the Chicago, Burlington and Quincy Railway upon payment of the price there. In some instances, however, the agent at the Philadelphia office took the cash price and issued a prepaid order. In each case, however, the contract was closed at the Philadelphia office, and had the Chicago, Burlington and Quincy Railway Company refused to honor the order, it could have been sued by the purchaser on the ground of the contract made by him with the Philadelphia agent at the Philadelphia office.

The contract for the transportation of freight was somewhat similar. If a shipper, through the solicitations of the agent at Philadelphia, was induced to agree that goods destined to a point in the territory reached by the Chicago, Burlington and Quincy Railway lines, should be shipped via those lines, he would first take a bill of lading from the initial carrier from Philadelphia to the point of junction with the Chicago, Burlington and Quincy Railway. This bill of lading he would surrender to the Philadelphia agent of the Chicago, Burlington and Quincy Railway Company at the Philadelphia office of that company and receive in return a receipt called a bill of lading, a copy of which is printed in full on page twenty-seven of the Record. This receipt, signed by the Philadelphia agent, acknowledges the receipt of the bill of lading of the initial carrier and undertakes, that if the goods are delivered to the Chicago, Burlington and Quincy Railway at the terminus of the initial line, the Chicago, Burlington and Quincy Railway will transport them over its lines at a specified rate of freight. There was also printed on it a stipulation that the goods had not yet been received by the Chicago, Burlington and Quincy Railway

Company, and that the company assumed no obligation in respect to them, nor would the bill of lading be in force until the goods were received by the said company.

As in the case of the passenger contracts, so in the case of the goods, the contract was made at the Philadelphia office of the corporation by its agent located there. It was to be performed by transportation of the goods in various other States. The liability of the corporation was conditional upon the actual receipt of the goods by it at the junction with the initial line, but it could not refuse to receive the goods, nor could the shipper select another route. A contract had been made in Pennsylvania, binding on both parties.

In the court below it was argued that the shipping receipt or bill of lading issued by the corporation in Philadelphia in exchange for the surrender of the bill of lading issued to the shipper by the initial line was not a binding contract made in Pennsylvania, but a mere application by the shipper for a contract to be made in Illinois, and in support of this contention the decision of this court in Holder *vs.* Aultman 169 U. S., 81, was cited.

This latter case, however, simply ruled that a contract signed by a local agent in Michigan, and which expressly stipulated that it was not to be "valid" unless countersigned at Ohio, was not "made" in Michigan, but in Ohio. In the present case the contract was valid and complete in Pennsylvania. The company received at its office in Pennsylvania the consideration for it in the surrender to it of the shipper's bill of lading over the initial line. It contained, it is true, the provision that as the goods had not yet been received by the company, no obligation was assumed by the company, nor would the bill of lading be in force until the freight was actually received, but this was far from stipulating that the contract was conditional upon any approval or signature at Chicago. On the contrary, the company was bound to receive the goods when they reached its lines, and the shipper having surrendered his bill of lading for them, and thus given the

company the sole right to receive them from the initial line, was equally bound. The contract was complete on both sides. It was to be performed by the railroad in Illinois. It had been partially performed in Pennsylvania by the shipper by surrender of his original bill of lading at the company's office in Philadelphia, but it had undoubtedly been made in Pennsylvania by the company's agent at the company's office there.

In all three cases, therefore, the corporation habitually made binding contracts in Pennsylvania, through its agents there. It was for the very purpose of making such binding contracts there and thus securing there the passengers and freight for its lines that it established an office and located a general agent there. It did not pretend to be an agent for the initial carriers. It made these contracts through its own agent at its own place of business, on its own account, and it made them in Pennsylvania because it preferred to do the business in Pennsylvania, and thus secure the freight and passengers beyond recall, rather than to trust to the uncertain chance of capturing them at Chicago.

Either one of the three grounds given above, viz., location of office, appointment of general agent and making of contracts, would, it is submitted, have been sufficient to sustain the jurisdiction. Together they would seem to place the question beyond dispute.

There are two reported cases, one Federal and one State, in which the facts are almost if not quite identical with the present case.

In the case of

Denver & R. G. R. R. Co. *vs.* Roller, 100 Fed., 738,

the Denver & Rio Grande Railroad Company, a corporation of the State of Colorado, was sued in California for a tort committed in Colorado, and the action was removed to the United States Circuit Court for the South-

ern District of California. A motion was made to dismiss the action for want of jurisdiction. It appeared that the railroad company had an office in the city of San Francisco with a sign "Denver and Rio Grande R. R. Freight "and Passenger Office." On a folder issued by it was found the name of "W. J. Shotwell, Gen'l. Agt. Pacific "Coast, 314 California Street, San Francisco." At that office the agent and the clerks under him solicited passengers and shippers to travel or send freight over the railroad lines and issued shipping receipts or bills of lading. The form of these shipping receipts is not given, but as they were issued in California for freight which started from that point over other lines, they were probably of the same nature as the shipping receipts in the present case.

The court below sustained the jurisdiction, and upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, Mr. Justice McKenna, sitting as one of the court, the judgment was affirmed.

The court (Hawley, D. J., delivering the opinion), after reciting the above facts, said:—

> "It thus clearly appears that the plaintiff in error "had a business office in the city of San Francisco, "State of California, and a managing agent in charge "of that office, for the purpose of soliciting business "in transporting passengers and freight over its road, "situated in the State of Colorado. Is not this suffi- "cient to authorize a valid service of summons upon "the authorized agent of the corporation? It will be "noticed that, if there is no cashier or secretary upon "whom service can be made, the code does not spec- "ify the extent of the agency required in order to bind "a non-resident corporation by service of summons, "except that the person must be a 'managing or busi- " 'ness agent.' It is obvious that this does not mean "that it must be the general managing agent of the "corporation. The object of the service is attained "when the agent served is of sufficient rank and char- "acter as to make it reasonably certain that the cor- "poration will be notified of the service, and the stat-

"ute is complied with if he be a managing or business "agent in any specified line of business transacted by "the corporation in the State where the service is "made. That Shotwell, upon whom the service was "made, was such an agent, is manifest from the facts "above stated."

The case of

Tuchband *vs.* Chicago & Alton R. R., 115 N. Y., 437,

was a somewhat similar case. The suit was in the State of New York for a cause of action arising in Missouri. The defendant was a railroad corporation incorporated under the laws of another State. The statutes of New York allowed service on the "managing agent" of a foreign corporation if it had property in the State.

It was shown that there was an office, 261 Broadway, New York City, on the windows of which were the signs "Chicago and Alton Railroad," "Freight and Passenger "Agency Chicago and Alton Railroad" and "Chicago and "Alton Railroad Office." On its circulars and time tables it gave in its list of officers and agents, Charles Oberg, "General Agent, Passenger Department, 261 Broadway, "New York." The agent testified that he had charge of the correspondence and business matters relating to carriage of passengers, but had nothing to do with the freight department. The property of the corporation in the State consisted of office furniture, tickets and other articles in its office and cars for transportation.

The service was made on the general agent in charge of this office, and the Court of Appeals of New York sustained the jurisdiction, saying:—

"When the corporation has an office in this State "where a substantial portion of its business is trans- "acted by a person designated by itself as a general "agent, although followed by words indicating some "one department, it may safely be assumed that the "object of the statute will be accomplished. It, of "course, intends a 'managing agent' in this State,

"and where a corporation created by the laws of any "other State does business in this State, the person "who, as its agent, does that business should be con- "sidered its managing agent, and more especially "should that be so where the foreign corporation has "an office or place of business in this State, and when "that office is in charge of that person and he there "acts for the corporation. He is there doing busi- "ness for it, and so manages its business. Such per- "son is, in every sense of the words used in the stat- "ute, 'a managing agent.' Corporations of this de- "scription have become very numerous. They carry "on an extensive business in this State. They may "sue in our courts and may be required to answer as "defendants in the same tribunals, and if they have "notice to do so in the simple and summary manner "prescribed by statute, the ends of justice will be at- "tained.

"It was the duty of Oberg, the person served, to "send the papers he received to his principal, and it "was his declared intention to do so. It was, in fact, "done, and the defendant appears not to answer to "the suit, but to complain of the insufficiency of serv- "ice. We think the objection unavailing."

The court below in the present case bases its decision against the jurisdiction upon two grounds (Record, page 18), viz:—

First.—That the case was ruled by the previous decision of the same court in Earle *vs.* Chesapeake & Ohio R. W. Co., 127 Fed. Rep., 235.

Second.—That it was ruled by certain decisions of the Supreme Court of Pennsylvania cited in the brief of defendant.

These will be examined separately.

It is not necessary to discuss the question whether the case of Earle *vs.* Chesapeake and Ohio Railway Company was correctly decided. It is at variance with the decision of a federal court of equal jurisdiction in Van Dresser *vs.* Oregon R. W., &c., 48 Fed. Rep., 202. Whether cor-

rect or not, it has no bearing on the present case, since the facts were widely different. In Earle *vs.* Chesapeake & Ohio Railway Company, the defendant railway company had no office in the State of Pennsylvania; had no general agent in that State and made no contracts therein. It was a member of a freight soliciting bureau, known as Kanawha Despatch, composed of various railroad companies whose lines constituted a through route. The Kanawha Dspatch had an office and an agent in Pennsylvania, and the principal question in the case was whether the office was the office of the railroad company and the agent its agent. The court expressly found (127 Fed., 240) that the railroad corporation maintained no office in the State, and that the fact that it was a member of the soliciting bureau known as the "Kanawha Despatch" and contributed to the latter's expenses did not constitute the doing of business within the State.

So far from furnishing ground for declining jurisdiction in the present case, the case of Earle *vs.* Chesapeake & Ohio R. W. Co. might be cited as authority for sustaining that jurisdiction, since the decision against the jurisdiction in that case was based upon the absence of the very facts which existed in the present case. In that case it was found rightly or wrongly that the corporation maintained no office, had no agent and made no contracts. In the present case, the evidence conclusively showed that the corporation in its own name maintained an office, had a general agent and made contracts. It is submitted therefore that this, the principal reason given by the court below for denying jurisdiction, wholly fails.

The second reason given by the court below is that it is ruled by certain cases in the Supreme Court of Pennsylvania referred to in the brief of counsel for defendant (Record, page 9).

These cases were:—

Kilgore *vs.* Smith, 122 Pa., 48;
Comth. *vs.* Bell Tel. Co., 129 Pa., 217;
Fulton *vs.* Com. Travellers &c. Co., 172 Pa., 117;

Mearshon *vs.* Pottsville Lumber Co., 187 Pa., 12;
Wolf Dryer Co. *vs.* Bigler, 192 Pa., 466;
Building Assn. *vs.* Berlin, 201 Pa., 1;
Delaware &c. Construction Co. *vs.* Bethlehem R. R., 204 Pa., 22.

Before discussing these cases it may be well to call attention to the fact that the question is not one of State law. Under the decision of this court in

Barrow Stp. Co. *vs.* Kane, 170 U. S., 100,

the liability of a corporation to suit in a United States Court does not necessarily depend either upon any contract express or implied between the corporation and the State, or upon any State statute, but upon the fact whether the corporation has located itself within the jurisdiction of the court, and has within that jurisdiction a representative agent upon whom service can be made. The court in that case said:—

> "The fact that the legislature of the State of New "York has not seen fit to authorize like suits to be "brought in its own courts by citizens and residents "of other States cannot deprive such citizens of their "right to invoke the jurisdiction of the national courts "under the Constitution and laws of the United "States."

It may also be pointed out that the question whether a corporation is found within the jurisdiction does not necessarily depend upon whether it is doing business within the State laws regarding taxation or within the State laws requiring registration and appointment of an agent under penalty of refusal to enforce contracts.

It might well be that a corporation engaged in interstate commerce might not be subject to taxation or compelled to register under laws relating to the doing of business by foreign corporations, and yet might be liable to suit both in the State and Federal courts, if it had in fact established an office within the jurisdiction and was carrying on a branch of its business there.

Before considering the cases referred to, it may be useful also to refer to the statutes of Pennsylvania relating to foreign corporations, and the decisions as to method of service.

Art. XVI, Section 5, of the Constitution of Pennsylvania provides:—

> "No foreign corporation shall do any business in "this State without having one or more known places "of business and an authorized agent or agents in the "same upon whom process may be served."

Sections 1 and 2 of the Act of April 22, 1874, P. L., 108, provide:—

> "SECTION 1. No foreign corporation shall do any "business in this Commonwealth until said corpora- "tion shall have established an office or offices and ap- "pointed an agent or agents for the transaction of its "business therein.
>
> "SECTION 2. It shall not be lawful for any such cor- "poration to do any business in this Commonwealth "until it shall have filed in the office of the Secretary "of the Commonwealth a statement under the seal "of said corporation and signed by the president or "secretary thereof, showing the title and object of "said corporation, the location of its office or offices "therein, and the certificate of the Secretary of the "Commonwealth under the seal of the Common- "wealth of the filing of such statement shall be pre- "served for public inspection by each of said agents "in each and every of said offices."

Section 3 of the Act of March 21, 1849, P. L., 216, provides:—

> "In all suits or actions hereafter to be brought in "any court of record of this Commonwealth, against "any foreign corporation or body corporate, not "holding its charter under the laws of this Common- "wealth, every judgment, verdict or award rendered "against such corporation shall be final and conclu- "sive, unless the said defendants, in addition to the "usual proceedings in cases of appeal, shall give good

"and sufficient bail, in the nature of bail absolute, for "the payment of such sum or sums as shall be finally "adjudged to be due to the plaintiff or plaintiffs, to- "gether with interest and costs thereon. And in the "commencement of any suit or action against any "such foreign corporation, process may be served "upon any officer, agent or engineer of such cor- "poration, either personally or by copy, or by leav- "ing a certified copy at the office, depot or usual "place of business of said corporation, and such serv- "ice shall be good and valid in law to all intents and "purposes."

The second section of the Act of July 9, 1901, as amended by the Act of April 3d, 1903, P. L., 139, provides:—

"*Second.* The writ of summons, the writ of attach- "ment in execution, and the writ of *scire facias* in per- "sonal actions, may be served by the sheriff upon a "corporation, a partnership limited, or a joint stock "company, in the county wherein it is issued. in any "one of the following methods:

"(*a.*) By handing a true and attested copy thereof "to the president, secretary, treasurer, cashier, chief "clerk, or other executive officer, personally; or,

"(*b.*) By handing a true and attested copy thereof "to an adult member of the family of any one of said "officers, at his dwelling house; or,

"(*c.*) By handing a true and attested copy thereof, "at his place of residence, to an adult member of the "family of the person with whom any of the said "officers resides; or

"(*d.*) By handing a true and attested copy thereof, "at his place of residence, to the manager or clerk "of the hotel, inn, apartment house, boarding house, "or other place of lodging, where any of said officers "resides; or,

"(*e.*) By handing a true and attested copy thereof, "at any of its offices, depots or places of business, to "its agents or person for the time being in charge "thereof, if upon inquiry thereat the residence of one "of said officers within the county is not ascertained, "or if from any cause an attempt to serve at the "residence given has failed; or,

"(*f.*) If the corporation, partnership limited, or "joint stock company has no office or place of busi- "ness in actual operation in the county where the "cause of action arose, then service may be made in "such county upon any member of its board of direc- "tors, in any of the methods set forth in clauses *a*, *b*, "*c*, or *d* hereof; or,

"(*g.*) If the corporation, partnership limited, or "joint stock company has no office or place of busi- "ness in actual operation in the county in which the "cause of action arose, and no member of its board "of directors, or other officers, is a resident of the "county in which the cause of action arose, then serv- "ice may be made in any of the methods set forth in "clauses *a*, *b*, *c*, *d*, *e*, or *f* hereof, in any other county "than that in which the writ issues, by the sheriff of "such other county, who shall be deputized for that "purpose by the sheriff of the county in which the writ "issues; or,

"(*h.*) In the case of a registered foreign corpora- "tion, partnership limited, or joint stock company, "by serving its duly registered attorney as in the "case of a summons issued against him personally, "or by leaving a true and attested copy thereof for "him, at the registered place, if he be not found there "during the usual business hours of any business day, "with the person for the time being in charge of the "business carried on at such place.

"Provided, That two returns of *nihil habet* be equiv- "alent to personal service in writs of *scire facias*, to "revive judgments entered in personal actions."

In interpreting these statutes, the Supreme Court of Pennsylvania has decided:—

First.—That a foreign corporation doing business in Pennsylvania may be sued therein, notwithstanding that it has filed no statement nor designated an agent to accept service.

Hagerman *vs.* Empire Slate Co., 97 Pa., 534.

Second.—That if a foreign corporation fails to register, it cannot enforce its contracts by suit in Pennsylvania courts.

Delaware River &c. Co. *vs.* Bethlehem &c. Co., 204 Pa., 22.

Third.—But that it will not be considered as doing business so as to subject itself to this penalty if its business is solely interstate commerce and it has no established office or general agent in the State.

Mearshon & Co. *vs.* Pottsville &c. Co., 187 Pa., 12.

The Pennsylvania cases referred to by the court below as sustaining the contention that the court had no jurisdiction will now be examined.

The case of

Kilgore *vs.* Smith, 122 Pa., 48,

was an action or replevin. A number of canners, some in Maryland and some in Pennsylvania, had formed a Maryland corporation for the sale of their goods. The Maryland corporation became largely indebted, and at a meeting of its directors, held at a town in Pennsylvania, on the Maryland line, and extending into both States, sold a large quantity of goods to one of its creditors, including the goods in the hands of one of its Pennsylvania members. The latter refused to deliver up the goods and, upon replevin brought by the purchaser, set up as a defense that the transaction amounted to the doing of business in Pennsylvania, and that, as the Maryland corporation had not registered, it could not enforce its contract in the Pennsylvania courts.

The court held that neither the fact that there were Pennsylvania members of this co-operative Maryland corporation, nor the fact that an occasional meeting was held at a town on the State line, constituted the doing of business which would make the contract unlawful, and sustained the action.

The case of

Comth. *vs.* Bell Tel. Co., 129 Pa., 217,

was an appeal by a Massachusetts corporation from a settlement of taxes in Pennsylvania. The only question involved was whether the Massachusetts corporation employed any part of its capital in Pennsylvania by leasing under Massachusetts contracts telephones to be used in Pennsylvania by Pennsylvania corporations on payment of royalty. The court held that the Massachusetts corporation did not employ any part of its capital in Pennsylvania and was not taxable.

The case of

Fulton *vs.* Commercial Travellers' &c. Co., 172 Pa., 117,

was a suit in Pennsylvania against a mutual insurance company of another State. The return of the sheriff was that he had served the writ by delivering a copy to "Dr. T. J. Patterson, agent for" the corporation. A rule was taken to set aside the service. The court below upon the evidence found:—

First.—That T. J. Patterson was a mere physician or surgeon for the company, whose sole duty was to examine members and report, and that he was not an agent on whom service could be made.

Second.—That as all applications for membership were sent to New York and all policies issued there, the company was not doing business in Pennsylvania.

The court below set aside the service, and this was affirmed in the Supreme Court in a short *per curiam* opinion.

There is nothing in the case to indicate that the company had any office or general agent in Pennsylvania, or that it ever sent agents into Pennsylvania or made or performed contracts there.

The case of

Mearshon *vs.* Pottsville Lumber Co., 187 Pa., 12,

was a suit of a Michigan corporation to recover the price of goods. The case is also reported in 42 Weekly Notes

of Cases, 399. No very clear statement of facts is given in either report, but from the opinion of the court, and the facts stated in the two reports, it appears that the Michigan corporation at one time had a resident agent named Bacon and duly registered as a foreign corporation, giving Bacon's name as a resident agent to accept suit. Subsequent to this, the office was given up, and Bacon removed from the State. Subsequent to such removal Bacon came to Pennsylvania, as a salesman for the Michigan corporation, and obtained an order from defendants for goods, which order the Michigan corporation executed in Michigan. The goods were not paid for and the Michigan corporation brought suit. The defense was that at the time of suit the Michigan corporation had no office or resident agent in Pennsylvania, but the court held that taking an order for goods by non-resident salesman was not a doing of business which made registration necessary.

In the course of this opinion, the court refers to a case of

Blakeslee Mfg. Co. *vs.* Hilton, 5 Pa., Superior, 184, a decision by an intermediate Appellate Court, and quotes with approval the following language from the opinion on that case:—

> "All that is hereby alleged is entirely consistent "with the conduct of a foreign corporation engaged "in strictly interstate commerce. It may advertise "its goods, take orders, make contracts of sale re- "specting the same, and ship them to customers in "this State. It may also employ agents living in "Pennsylvania to go from county to county, from "town to town and from person to person to secure "orders, or the agent may never go outside of his "own county, city or town, thus being in one sense "a local agent, and yet be doing a business which is "not and cannot be reached under our Act of 1874. "* * * The words 'doing any business' as used in "the Act should not be construed to mean taking or- "ders or making sales by samples, by agents coming "into our State from another for that purpose. To

"hold otherwise would make the Act offend against "the Constitution of the United States as imposing "unlawful restrictions on interstate commerce."

The above case of

Blakeslee Mfg. Co. *vs.* Hilton, 5 Pa., Superior, 184,

referred to by the Supreme Court of Pennsylvania was a suit for the price of a steam pump sold by an Illinois corporation f. o. b. cars, Duquoin, Ill. The defendant in his affidavit of defense alleged that the pump was ordered from the Illinois corporation through its agent, Eugene McIlvaine, located at Bradford, Pennsylvania, but it was not stated that McIlvaine was a permanent or resident agent, or that he had an office or place of business of business or stock of goods in Pennsylvania. Elsewhere in the affidavit it was alleged that the Illinois corporation had advertised through its local agent and by other means its purpose and intention to transact business within Pennsylvania, offering to sell its goods to customers residing in Pennsylvania and had made many sales of goods to residents of Pennsylvania.

The court held that these allegations were too vague and indefinite to show that the corporation was doing business in Pennsylvania within the meaning of the Act requiring registration, and hence that the plaintiff was not precluded from maintaining the suit.

The case of

Wolf Dryer Co. *vs.* Bigler, 192 Pa., 466,

was an action of replevin by an Illinois corporation to recover a "dryer" which had been sold to defendant under terms which reserved the title in plaintiffs until payment. Defendant refused to either pay or return the dryer and upon replevin being brought set up that the Illinois corporation had not registered as a foreign corporation and could not therefore maintain the suit. The facts relied upon and the decision with regard to them sufficiently appear in the following extract from the opinion:—

"The contention that the plaintiff could not main- "tain an action in this State because it was a foreign

"corporation and had not complied with the provi-
"sions of the Act of April 22, 1874, P. L., 108, is
"without merit. It had no office or place of business
"in Pennsylvania and no part of its capital was here.
"The machinery sold was shipped either directly from
"its factory in Chicago or upon its orders given to
"other manufacturers. The fact that its agent came
"into this State and made contracts for machinery to
"be delivered here did not bring it within the inhibi-
"tion of the Act of 1874."

The case of

People's Bldg. & Loan Assn. *vs.* Berlin, 201 Pa., 1, was an action to foreclose a mortgage held by a New York Building Association on property in Pennsylvania. The mortgage was negotiated through agents of the Building Association at Bradford, Pennsylvania, but this agent merely sent the application to the company's office in New York, and the contract was completed there and the money to be paid there. The defense set up was that the plaintiff was a foreign corporation which was doing business in Pennsylvania but had never registered there, and that therefore it could not maintain the suit.

The court reversed a judgment for defendant saying:—

"The remaining question for consideration is,
"whether the transaction, on the part of the plaintiff,
"was such a 'doing of business' in Pennsylvania as is
"contemplated in the prohibition of the Act of
"April 22, 1874. As we have already seen, under the
"articles of association and the by-laws, and as a mat-
"ter of fact, the business of the association was done
"in New York. Its corporate functions were all ex-
"ercised there. The applications for stock and for
"the loan were made and considered in New York,
"and there accepted. By the express terms of the by-
"laws, the money paid by the stockholders and bor-
"rowers was to be paid there, as was also the pay-
"ment of the money to the defendant by the asso-
"ciation in the completion of the transaction. In the
"contemplation of the law, the entire contract, from
"inception to the finish, was performed in New York.

"The opinion of the Superior Court seems to be "grounded upon the assumption that the transaction "involved the investment or employment of a part "of the plaintiff's capital within the State of Pennsyl- "vania. The money was, however, loaned on the "bond, a New York contract, and the mortgage was "given merely as security. The plaintiff took no title "to any property in Pennsylvania by the transaction. "It merely made a loan of part of its capital to one "of its shareholders, who was a citizen of Pennsyl- "vania. The capital, if employed in the State of "Pennsylvania, was so employed by a citizen of Penn- "sylvania and not by the plaintiff corporation. In "so far as the business of loaning money was con- "cerned, it was carried on in the State of New York, "and not in the State of Pennsylvania. If the opera- "tions of the plaintiff be measured by the test of "agency, they will not be found, under the decisions, "to be in violation of the Act of 1874. The Act of a "foreign corporation in selling goods here by agents, "and shipping the goods to purchasers, is not doing "business in this State, within the prohibition of the "Act: Mearshon *vs.* Pottsville Lumber Company, "187 Pa., 12; Wolff Dryer Company *vs.* Bigler & Co., "192 Pa., 466. The most that can be said of the plain- "tiff is that it had an agency at Bradford, by which "its shareholders in that vicinity were more conve- "niently enabled to do business with the home office "of the plaintiff corporation in New York."

The case of

Delaware &c. Construction Co. *vs.* Bethlehem R. R., 204 Pa., 22,

was a creditor's bill filed by a New Jersey corporation to obtain a receiver for a railway company which owned the New Jersey corporation $31,765.43 for labor and materials furnished in the construction of a railway in Pennsylvania. The defendant demurred on the ground that the plaintiff by constructing for defendant ten miles of road in Pennsylvania had done business in that State, and that as it had not registered until two months after

the work was completed, it could not maintain its bill. The court below sustained the demurrer and the Supreme Court affirmed the judgment, holding that the Act of 1874 prohibited foreign corporations from doing business without filing a statement giving the location of its office and the name of its agent; that the defendant had come into the State with its workmen, and for six months had been engaged in building a railway there; that the subsequent registration could not validate the prior business, and that the public would not receive the protection designed by the Act if the corporation was allowed to maintain a suit based on the work done and materials furnished before registration.

The foregoing are all the decisions of the Supreme Court of Pennsylvania cited in the argument in the court below in the present case, and this review of them shows that not one of them is authority for the conclusion reached by the court below in the present case, that the Chicago, Burlington and Quincy Railway Company was not doing business in Pennsylvania.

Only one of the seven cases involved any question of the liability of a foreign corporation to suit, and in that case (Fulton *vs.* Com. Travellers &c. Co., 172 Pa., 117) it did not appear that the company had any office or general agent in Pennsylvania, and the service was on an examining physician who was clearly not a representative agent of the company.

The other cases involved the right of the State to tax foreign corporations or to deny them the right to bring suit as a penalty for not registering. The question as to what will be a doing of business which will enable a State to tax or to deny the right of suit, is manifestly a different question from the one as to what will be such a doing of business as will amount to the coming of the corporation within the jurisdiction, so as to subject it to suit. The State, for example, might not be able to tax or to impose unreasonable regulations on interstate commerce, and yet corporations engaged in interstate com-

merce are not thereby exempt from suit if they open an office and have a general agency in a State. If, however, there were no distinction and the same rule was applicable to both classes of cases, the Pennsylvania cases cited do not support the ruling of the court below. In not one of them was there the establishment within the jurisdiction of an office distinctively the corporation office with the corporation name and the employment of a general agent so designated.

Not one of these cases decides that where a corporation establishes an office in its own name in a foreign State, puts it in charge of a general agent, and maintains there a corps of employees paid by the corporation, it is not doing business within such State.

It is submitted, therefore, that the ruling of the court below cannot be supported for either of the reasons stated in the opinion. It remains only to notice one other argument made for defendant in the court below.

It was contended that "soliciting" business was not "doing" business, and that where a corporation merely sent agents into a foreign State to solicit the inhabitants thereof to go to the State where the corporation was located and there do business with the corporation, it could not be said to be doing business in the State where the soliciting was carried on.

In support of this the defendant cited a number of cases.

It is not necessary to discuss the question whether these cases were all correctly decided on their facts, nor even whether the rule which defendant claims to be established by them, that the "soliciting" of business is not the "doing" of business, is correct.

If such question were material, it would be submitted with great confidence that no general rule can be laid down separating "soliciting" from other business, and that if a corporation opened an office, established therein a permanent force of employees, and put all in charge of a general agent, it would be found for purposes of service in that jurisdiction, even though the branch of business there carried on was a "soliciting" business.

This question, however, is not material here, and it is sufficient to point out that, in the present case, the defendant corporation went far beyond the mere soliciting of persons to go to the home State of the corporation and do business with it there. So far from confining itself to such solicitation, it opened an office in Pennsylvania and announced that this was its office where persons might come to do business with it, and at that office it transacted business with such persons as came there and made contracts with them through an agent specifically designated as a general passenger and freight agent.

When such advertised general agent wrote to R. L. Gardiner the letter found on page 24 of the Record and said:—

> "We can furnish you with a ticket or an order for "ticket at this office reading from Chicago to "Denver,"

he did more than solicit—he assumed to be able to act. He did not say go to Chicago and do business there with the company, or make an application and let me forward it to Chicago. He said come to the office of the company at Philadelphia, and there pay your money and receive a ticket or order. And if afterwards in accordance with his testimony (Record, page 10) he had taken Mr. Gardiner's money and handed him a prepaid order for a ticket, he would have made a contract which was binding on the company and which would have given Gardiner a right to sue, if the prepaid order had not been honored on presentation at Chicago. This was not solicitation, but representation.

The same may be said of the issuing of the so-called "bills of lading." The general agent of the corporation at its office in Philadelphia did not solicit shippers to go to Chicago and there transact business, nor did he simply ask for an application from them which he would forward to Chicago. On the contrary he asked them to come to the Philadelphia office, and there he received from them a surrender of their bills of lading over the initial lines, and gave them in return a contract binding on the cor-

poration by which it undertook to receive and carry the goods upon their arrival at the point of junction with the corporation's lines. The very object of establishing an office in Pennsylvania, and making a final contract there, was to capture the shipper in Philadelphia, so that he should surrender there his original bill of lading and be there bound to shipment over the company's lines. He could not afterwards be lured away by rival lines, but in order to accomplish this, the company was also bound to receive and transport the goods.

Conceding, as it must be conceded, that under the decisions of this court a corporation if it does continuously and substantially engage in business in a State foreign to its incorporation, is liable to suit there, it is submitted that the facts of the present case show that it is within the rule and that the jurisdiction should have been sustained. It is submitted that to hold otherwise would be to allow a foreign corporation to locate itself within a jurisdiction for the purposes of doing business therein with the citizens thereof and yet not be liable to suit by such citizens in that jurisdiction—a doctrine at once repugnant to natural justice and contrary to the repeated rulings of this court.

FRANK P. PRICHARD,
JOHN G. JOHNSON,
For Plaintiff in Error.